No. ______

In the
Supreme Court of the United States

WARREN BALOGH,
Petitioner,

v.

CHIEF AL THOMAS;
LIEUTENANT BECKY CRANNIS-CURL;
CITY OF CHARLOTTESVILLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Frederick C. Kelly, III
LAW OFFICE OF
FREDERICK C. KELLY
One Harriman Square
Goshen, NY 10924
(845) 294-7945
fckellylaw@protonmail.com

Glen K. Allen
Counsel of Record
GLEN K. ALLEN LAW
5423 Springlake Way
Baltimore, MD 21212
(410) 802-6453
Glenallenlaw@protonmail.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Whether the First Amendment protects speech amid violence left deliberately unchecked by the local government because such violence serves as useful pretext to suppress speech the local authorities hate?

Whether this Court can ignore the extraordinary case of a local government which temporarily abdicates its monopoly on violence to ensure anarchic conditions enabling it to dishonor the First Amendment?

Whether the use of some defensive violence by protestors overwhelmed by government favored counter-protestors forfeits any First Amendment claim by any persons associated with the protestors?

Whether police officers who deliberately abdicate their responsibility to maintain order — and in fact take additional steps to foment more violence— are entitled to qualified immunity?

Whether a municipality escapes *Monell* liability where the final policy maker watches his police force enhance violent conditions by standing down in the face of known criminal anarchists?

PARTIES TO THE PROCEEDING

Petitioner is Warren Balogh ("Balogh"). Respondents are Chief Al Thomas ("Chief Thomas"), Lt. Becky Crannis-Curl ("Lt. Becky"), and the City of Charlottesville ("Charlottesville").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s):

Cases:

Rules:

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Balogh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("COA").

OPINIONS BELOW

The opinion of the COA[1] (App. 1a) is published at 120 F.4th 127 (4th Cir. 2024) ("COA Opinion"). The opinion of the United States District Court for the Western District of Virginia ("District Court") is available at 2023 WL 3121220 (W.D. Va. 2023) (App. 24a) ("District Court Opinion").

JURISDICTION

The judgment of the COA was entered on October 23, 2024. App. 22a. Petitioner moved for rehearing *en banc* which was denied by the COA on November 19, 2024. App. 43a. The ninety days from the denial of rehearing would run on February 18, 2025 (February 17, 2025 is a holiday). This Petition is being filed on February 14, 2025. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble".

---

[1] Specific discussions of all Opinions below shall be cited to where they are found in the Appendix ("App.").

STATEMENT OF THE CASE

I. *Overview*

This case presents the issue of whether the First Amendment protects speech amid criminal violence left deliberately unchecked by the local government precisely because the criminals were in league with the local government and both wanted to suppress speech. It presents an extraordinary fact pattern and raises important issues that go to the very core of government legitimacy.

Pace the COA at App. 2a, it does not remotely ask the "straightforward question: does the First Amendment protect speech amid violence?" – a question phrased by the COA in such abstract terms it is not only meaningless, but dangerous in its ambiguity.

The COA Opinion raises a significant threat to the First Amendment and beyond. Violence is an unfortunate but persistent fact of life; indeed, we might say it is the threat of ever-present violence which gives rise to the need for government in the first place (certainly our Founders, who borrowed extensively from the "State of Nature" paradigms of Hobbes and Locke, would agree[2]). Phrasing the question in such abstract terms avoids the urgent issues the COA should have confronted, but did not, such as: How much violence? Did the police have the means to check it? Whose violence was it? And perhaps most importantly, did it matter that the

---

[2] e.g. "Locke was the writer whose presentation of the principles of government was most admired by the American Founders." Thomas G. West, Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America (Rowan & Littlefield, Lanham: 1997), p. 43.

miscreants who engaged in violence enjoyed the tacit backing of the state?

The COA sidestepped a case rich with potent First Amendment issues by playing ostrich and ignoring the seated facts on a motion to dismiss. In doing so, it appeared unwilling to challenge the narrative wrought by media accounts of the Unite the Right debacle, media accounts which bear no relation to the record created by the City of Charlottesville itself with an independent report (*viz.* the "Heaphy Report"[3]) released in the aftermath of the Charlottesville disaster. If so, this is a twofold abdication of judicial responsibility: a failure of both intellect and nerve.

If the First Amendment must be read to resist "persistent and insidious threats" (*Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)), the formulation of the COA, whereby abstract "violence" serves as a ready excuse for local government to abandon its duties and suppress speech, then there is no effective check on insidious threats — and no end to government enabled mischief and mayhem. In fact there is a perverse incentive for criminals to bring violence precisely so that when they find allies in the government, they can conspire with the authorities to effectively suppress speech without consequence. Such connivance is worse than mob rule because a dissident minority is confronted by a combination of superior brute force in the criminal anarchist

[3] Specifically, the law firm of Hunton & Williams (now Hunton Andrews Kurth) prepared an independent report commissioned by the City of Charlottesville in the aftermath of the Unite the Right debacle, entitled "Independent Review of the 2017 Protest Events in Charlottesville, Virginia." It was led by Hunton & Williams partner Timothy Heaphy, hence the "Heaphy Report."

elements coupled with the sophistication of modern government (which enjoys presumptions of good faith, formally or informally). The First Amendment stands no chance.

II. *FACTUAL BACKGROUND*

Petitioner Balogh was among the protestors who arrived in Charlottesville on August 12, 2017 to participate in the now infamous Unite the Right Rally. That infamy, of course, is part of the problem here. Charlottesville is seared into the national consciousness as the day that a group of vicious white supremacists descended onto that small Southern city causing mayhem and riot which ended in a car crash and one young woman's death. The fact that this narrative is belied by the independent Heaphy Report released by the City of Charlottesville itself has been no impediment to the legend.[4]

Nevertheless, the facts that Balogh urges here are derived overwhelmingly from the Heaphy Report. This point should be underscored especially in light of the remarkable facts presented here. Though Balogh is entitled to the usual deference provided by FRCP 12, he asks less that this Court believe him than take note of the extraordinary admissions made by the Charlottesville Respondents themselves in their own independent report on what went wrong with the Unite the Right disaster. Those facts alone warrant the interest of this Court.

The facts alleged show that Respondents sought to suppress the First Amendment rights of those like

[4] "When the legend becomes fact, print the legend." (John Ford's *The Man Who Shot Liberty Valance*.) It's good advice for constructing myths. It's terrible practice for a court of law. But here the courts have followed the old Hollywood director.

Balogh, who came to Charlottesville to protest the local government's policy of destroying Confederate monuments. In fact, prior to the rally, Charlottesville lost a court battle which resulted in an injunction ordering them to respect the rights of those, like Balogh, who came to protest their policy.[5] JA 13-14, 17-19 and the injunction referenced therein at "Kessler v. City of Charlottesville," Case 3:17-cv-00056-GEC, DE. 21.

But after losing the legal battle, it transpired that Respondents had a backup plan.

The local government maintained ideological alliances with Antifa counter-protestors, as did a significant portion of the most vocal citizenry of Charlottesville. For example, the second ranking executive in the Charlottesville government (Assistant City Manager Mike Murphy) favorably responded to an Antifa sponsored rally concerning the Confederate statutes on May 14, 2017. JA 135-36[6]. City Manager Maurice Jones was on the same

---

[5] The COA, as in so many instances, misses this fact. The district court that issued the injunction against Respondents Thomas and the City of Charlottesville had essentially found viewpoint discrimination in Respondents' attempts to cancel the rally. *Kessler v. City of Charlottesville*, Case 3:17-cv-00056-GEC, DE. 21, pp. 3-4. But the COA glosses over the fact that Respondents had already been caught once attempting to violate the First Amendment against the likes of Balogh and his fellow protestors, *viz.* "Because of these (then) generalized threats of violence, the City of Charlottesville revoked Kessler's permit days before the scheduled rally…" App. at 5a. Thus, Respondents prior First Amendment violation is recast as a neutral attempt to deal with "violence" from unknown quarters. The viewpoint discrimination has been conveniently memory-holed.

[6] References to the JA are to the joint appendix filed in the court of appeals (Docket Entry 31).

electronic trail which originated with another city government official. *Id.* And when the police did their job and protected a dissident group from Antifa violence on July 8, 2017 (JA 163), they faced severe criticism from many of Charlottesville's citizens and the City Council. JA 169-70, 175, 179.

Moreover police intelligence gathered by Respondents in the weeks before the UTR rally showed that, like the Charlottesville government itself, the Antifa were intent on preventing the rally from taking place. The Antifa's tactics included quaint practices involving cement cans and urine bombs, and other violent criminal acts. (JA 177, 195, 259, 262 for the quaint practices; JA 135-136, 158, 163, 169-170 for Respondents' alliances.) Through accurate intelligence reports, Respondents learned that the Antifa counter-protestors would outnumber Balogh and the other UTR partisans by a ratio of two to one. JA 177 and 259.

Moreover, Respondents had more than just accurate intelligence reports. They enjoyed (if such is the word) the benefit of direct experience dealing with the Antifa during a previous protest over the demolition of the Confederate monuments that took place on July 8, 2017, just one month before the UTR rally. JA 165-68. That experience confirmed both the criminal violence of the Antifa and the Antifa's well-coordinated support from large segments of the Charlottesville citizenry.

Thus, Respondents understood exactly what kind of tactics their Antifa allies would bring to the streets on the morning of the Unite the Right rally; they knew that such violent tactics would be welcomed by a considerable number of Charlottesville's own

citizenry; and they knew that whatever violence would occur would come overwhelmingly from their Antifa allies, who were projected to outnumber the hated UTR rallygoers two to one. JA 176-77, 259.

Under Virginia law, the government can declare an unlawful assembly and shut down a rally where there is "the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order…" Code of Virginia § 18.2-406.

Thus, with their Antifa allies coming to Charlotteville, Respondents did not need to do anything in order to shut down the UTR. In fact, they needed to do nothing: if they had kept order by doing something, they might not have been able to plausibly invoke Virginia's declaration of unlawful assembly and thereby cancel the UTR rally.

Respondents therefore settled on a strategy – which was communicated on the morning of the UTR rally to the rank and file police well before the violence started — of declaring an unlawful assembly and dispersing the crowd. JA. 205. To that end everything that had worked to protect dissident speech at the July 8, 2017 event, such as the attempt to separate groups, the use of barricades, and the enforcement of the law, was abandoned. Market street (effectively the southern border of the UTR rally in Lee park), where Respondents knew that the UTR Rallygoers would be confronted by the Antifa, was left deliberately unpoliced. JA 200-201, 203-204, 211, 237. To make doubly sure they enhanced what violence would occur, Respondents dispersed the UTR rally into the larger hostile crowd of Antifa that Respondents saw was waiting on Market Street. JA 242. In other words, Respondents took the heckler's

veto to its extreme, sinister conclusion: instead of removing unpopular speakers and attendants *from* a larger hostile crowd, they removed the unpopular speakers and attendants *into* the larger hostile crowd.

The plan was *never* (as the COA misstates it):

> "Rather than engage the crowd and prevent fights, the [law enforcement] plan [as conceived by Chief Thomas] was to declare the event unlawful [if violence ensued] and disperse the crowd." COA at 6a, purporting to quote from JA 205.

The first two square bracketed additions are benign, but the third is fraught with mischief: there is no conditional conjunction in the original wording of the Heaphy Report, which instead simply reads: "the plan was to declare the event unlawful and disperse the crowd." *JA 205*.

As demonstrated above, the facts show that it was not *if* violence ensued; it was *when* violence ensued. The COA not only adds a conjunction, it adds the wrong conjunction, one that implies some measure of good faith on the part of Chief Thomas and the other Respondents. Thus facts are added and inferences drawn in favor of the Respondents and against Balogh – exactly what Rule 12 prohibits.

One other fact is relevant to this abbreviated recitation: the sole attempt by a police officer to maintain order that occurred on the morning of the UTR rally was successful. That sole attempt occurred when one Lt. Hatter of the Charlottesville PD (the same who had noted Antifa's sophisticated and coordinated efforts at the earlier rally – JA 158) disregarded orders to refrain from interfering in

fights and rescued a UTR rally goer from an Antifa group assault. JA 235. It strongly suggests that order could have been maintained at the UTR rally if Respondents had made any *bona fide* effort whatsoever.

III. *PROCEDURAL POSTURE*

On August 12, 2019, Balogh, together with Gregory Conte (who was not on the appeal and is not a petitioner here), filed a pro se complaint against 16 defendants, alleging four claims under 42 U.S.C. § 1983 and two under 18 U.S.C. § 1962. After the defendants moved to dismiss in accordance with FRCP 12, the District Court stayed the motions pending the Fourth Circuit's decision in *Kessler v. Charlottesville*, No. 20-1704, 2022 WL 17085704 (4th Cir. Dec. 29, 2022) (per curiam) (unpublished). After the *Kessler* decision issued, the District Court on April 27, 2023 granted the defendants' motions to dismiss. In the course of addressing the motions to dismiss, the District Court granted the parties' request that the Heaphy Report be incorporated into the complaint. *See* App. 4a

Balogh filed a timely notice of appeal on May 26, 2023, as to the three Respondents named in this petition. The Fourth Circuit affirmed the District Court's dismissal on October 23, 2024. Balogh filed a timely petition for rehearing *en banc* on November 6, 2024. That petition was denied on November 19, 2024.

REASONS FOR GRANTING THE WRIT

Respondents' actions represent a significant elevation of the heckler's veto threat to the First Amendment; and in fact raise troubling questions

that go well beyond the denial of the right to speak. Plainly, Respondents have gone a step further than the heckler's veto: rather than rely on the mere threat of violence to suppress disfavored speech, they court actual violence to achieve the same illicit ends.

But this breaks perhaps the most fundamental pact citizens have with their government: we grant a monopoly on violence to the sovereign in exchange for which it assumes the duty to provide basic protection to life and limb. Once that duty is willfully abandoned, there is no telling where the trouble ends, and no reason to think that it stops short of serious mayhem, even to the loss of life.

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COA FRAMED THE WRONG QUESTION OF LAW, THUS OPENING THE DOOR TO COUNTLESS FUTURE FIRST AMENDMENT DEPREDATIONS.

This Court has signaled that the First Amendment can "necessitate police protection." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *see also, Hague v. Committee for Indus Org.,* 307 U.S. 496, 516 (1939). Drawing on this, the Sixth Circuit (among others) has come to the sensible conclusion that "[the First Amendment] may at times 'necessitate police protection.'" *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 250-51 (6th Cir. 2015), *quoting and citing Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana,* 379 U.S. 536, 551 (1965); and *Edwards v. South Carolina, supra.*

But at what times is the protection necessary? Conversely, when are the police excused from providing it? The exact scope of police protection remains unclear. Justice Black noted the ambiguity

in 1969 (*Gregory*, concurrence at 122) as did the Sixth Circuit in 2015. *Bible Believers*, 805 F.3d at 254.[7] Petitioner respectfully submits that the Sixth Circuit decision in *Bible Believers* is faithful to the First Amendment: while the courts cannot presume to dictate precisely when and how law enforcement must extend protection, the record must disclose some *bona fide* effort.

The COA exploits this ambiguity to reach a radically different result: the First Amendment does not in fact necessitate police protection ever, not even when such violence — easily foreseen and indeed counted on by the state — comes primarily and overwhelmingly from the government's own ideological allies. "Violence," unspecified in terms of quantity, quality, and origin, is enough to abrogate any obligation by the state. In the Fourth Circuit, no effort equates to a *bona fide* effort, especially when that effort would interfere with the government's inclination to suppress speech.

An interpretation of the First Amendment that places such little responsibility on the government to safeguard what is arguably our most fundamental right (*Palko v. Connecticut*, 302 U.S. 319, 327 (1937)) is not sustainable – especially in light of the facts revealed on this record.

Worse still, the abstract question presented by the COA invites abuse by the government. Violence cannot always be avoided (and it certainly cannot be avoided when the police press one group directly into

---

[7] That constitutional relic, *Feiner v. New York*, 340 U.S. 315 (1951), appears to stand for nothing more than the proposition that two policemen need not take on a crowd of eighty people (*id.* at 317), which is of little practical guidance.

another that is intent on fighting). In fact, sometimes, in order to ultimately check it, more violence is necessary, if only because superior force is the only thing that some men will respect. For that reason, if there is a government entity unscrupulous enough to league itself with criminal miscreants who are intent on using violence to suppress free speech rights, the criminals will always prevail to the detriment of free speech: their very lawlessness becomes the excuse for the corrupt government to suppress the speech of disfavored fellow citizens. In effect, the corrupt government benefits from the fact that it shares an ideological alliance with criminal elements.

Even more, those citizens who are targeted by both criminal miscreants and the corrupt government are placed between Scylla and Charybdis. Upon seeing that their government has relinquished the monopoly on violence, they have two options: they can resort to self-help and take matters into their own hands, or they can take a beating.

If they opt to take the beating, they can exercise no rights; in fact, they may end up forsaking the right to life itself.

But if they take matters into their own hands the very violence which government inaction has necessitated will become a strike against them.

This is an impossible situation. No sane government demands Ulysses-like guile to negotiate the exercise of First Amendment rights, nor would it demand Bronze age prowess from its citizens to secure their own safety.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE FOURTH CIRCUIT IS IN CONFLICT WITH THE SECOND, SIXTH, SEVENTH, AND NINTH CIRCUITS ON THE NEED FOR POLICE TO MAKE BONA FIDE EFFORTS TO PROTECT SPEECH BEFORE SURRENDERING THE STREETS.

As stated above, the Sixth Circuit has aptly concluded that the First Amendment requires that *bona fide* efforts must be made before moving against a speaker due to a hostile crowd. *Bible Believers*, 805 F.3d at 255.

Other Courts of Appeals that ally with the Sixth Circuit in *Bible Believers* include the Second Circuit (*Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993)) (plaintiffs sued police and other state actors in connection with a flag-burning demonstration; the plaintiffs alleged the police conspired with skinheads to permit the skinheads to assault the plaintiffs with impunity; the District Court dismissed complaint, but the Second Circuit reversed); the Seventh Circuit (*Hedges v. Wauconda Cmty Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)): "The police must preserve order when unpopular speech disrupts it; '[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'"); and the Ninth Circuit: *Hernandez v. City of San Jose*, 897 F.3d 1125 (9th Cir. 2018); *Meinecke v. City of Seattle*, 99 F.4th 514, 525 (9th Cir. 2024).

But in the Fourth Circuit there is no requirement that the police make any *bona fide* effort against violent hecklers before suppressing speech. Thus, the perils of participating in classic public forum

demonstrations which may draw violent counter-protesters are immense — even with a permit, and even with the benefit of a federal injunction. It is impossible to understate the chilling effects of such perils. This Court should acknowledge this split, resolve it against the Fourth Circuit, and uphold the First Amendment.

III. REVIEW SHOULD BE GRANTED TO CONFIRM THAT THE SIXTH CIRCUIT'S READING OF *TERMINIELLO* AND THE PRIMACY OF THE FIRST AMENDMENT (EVEN IN THE FACE OF VIOLENCE) IS CORRECT, RATHER THAN THE FOURTH CIRCUIT'S FACTITIOUS ABANDONMENT OF THE FIRST AMENDMENT.

Speech that turns violent (for whatever reason) presents difficult questions for a court because the motives and actions of the police become much more ambiguous: were the police acting to keep order, or were they acting to quell speech? Did they use the right amount of force, or not enough? Even a First Amendment absolutist such as Justice Black recognized the tension that courts must resolve when confronted with speech that threatened to turn violent, or degenerated into actual violence. *Gregory*, concurrence at 122.

And yet it is only a tension. The COA, however, collapses this tension by reading into the heckler's veto jurisprudence the rather sweeping requirement that everyone in the group one is associated with must at all times remain peaceful if one is to later plead the heckler's veto in court. This again avoids important issues, such as when and how an individual who is himself at all times peaceful forfeits his day in court because he is tarred with violence occurring

elsewhere in the group, or when the group would be justified in fighting back if the police abandon the streets – or even enhance the prospect of violence by pushing hostile groups together.

But it also reverses the balance struck by the Sixth Circuit in *Bible Believers* and this Court as long ago as *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

Over and against the COA, the Sixth Circuit observed, "In a balance between two important interests—free speech on one hand, and the state's power to maintain the peace on the other—the scale is heavily weighted in favor of the First Amendment." *Bible Believers*, 805 F.3d at 252. But that scale is tipped all too quickly to the opposite side by the overly rigid formulation of the COA.

Notably, the precedent that *Bible Believers* cited for the balance it would strike is *Terminiello v. City of Chicago*. In that case, there are some indications that Father Terminiello's crowd, besieged though it was a by a larger crowd, was not itself wholly peaceful. *Id.* at 13 (Jackson, J. *dissenting* and noting: "the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two.") Justice Jackson went on:

> "This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which

> their kind has devastated Europe. Increasingly, American cities have to cope with it. One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other's pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence." *Id.* at 23.

Yet *Terminello*'s continuing relevance and its extensive prodigy would seem to vindicates Justice Douglas's majority decision, not Justice Jackson's dissent. If so, the COA is reading into the heckler's veto an element of absolute pacifism that is not supported by the jurisprudence from *Terminiello* on down. The Court should explore and answer this fraught question.

IV. REVIEW SHOULD BE GRANTED TO CONFIRM THAT QUALIFIED IMMUNITY IS NOT AVAILABLE FOR POLICE AUTHORITIES WHO DELIBERATELY LEAGUE THEMSELVES WITH CRIMINAL ELEMENTS TO SUPPRESS SPEECH.

The COA erred in holding that the cases Balogh cited for denying qualified immunity to Chief Thomas and Lt Becky "didn't grapple with the circumstances here — a violent protest between protestors and counterprotestors." App. 19a.

In fact, the Ninth Circuit case of *Hernandez v. City of San Jose, supra,* was cited to the COA and it closely resembles what Chief Thomas and Lt. Becky accomplished here. Yet *Hernandez* held that where police officers forced Trump rallygoers "into a violent crowd of protesters and actively prevented them from reaching safety" continuing to implement the plan

"even while witnessing the violence firsthand," all while knowing that "similar, violent encounters had occurred in other cities" the constitutional violation was obvious enough that "qualified immunity is inapplicable, even without a case directly on point." *Id.* at 1138.

Put another way: ""[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.)

This Court, along with at least the Ninth Circuit and Tenth Circuit, has recognized there are cases where the constitutional violation is so flagrant qualified immunity is inapplicable, whether or not a case is directly on point. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Hernandez*, 897 F.3d at 1138; *Browder v. City of Albuquerque* at 1082-1083.

We respectfully suggest that this Court should grant certiorari to answer the question of whether, even with a Fourth Circuit case not directly on point, qualified immunity is available for local authorities who make common cause with criminal anarchists disrupting a speech event with cement cans and fecal bombs.

V. REVIEW SHOULD BE GRANTED TO DETERMINE IF CHARLOTTESVILLE ESCAPED *MONELL* LIABILITY WHERE THE FACTS SHOWED PLANNING AND RATIFICATION BY THE CITY'S FINAL POLICY MAKER.

Lastly, the COA erred in holding that Balogh's *Monell* claim failed. The COA reasoned that the only fact alleged tying the final policy maker to the Charlottesville debacle was the fact that the City Manager (Maurice Jones) "may have been present" in the Command Center where Chief Thomas watched the chaos unfold and where he was heard by at least two witnesses to say, "Let them fight, it will make it easier to declare an unlawful assembly." JA 240.

In the first place, the decisive issue is not that the City Manager "may have" been present in the Command Center. The Command Center was "reserved for key decision makers from CPD and VSP" (JA 216) and the Heaphy Report confirms that the City Manager *was* present in the Command Center, even if he momentarily went to a different floor within the same building.[8] JA 131 and 138.

Furthermore, the facts not only placed the City Manager in the Command Center, where he too, would have seen the chaos unfolding, but show that the City Manager took part in the planning for the UTR rally. For example, when Jason Kessler showed up to discuss how the UTR rally would proceed, it was City Manager Jones who attempted to convince Kessler to voluntarily move the rally. JA 190. And the City Manager, too, was on the receiving end of

[8] The City Manager appears to have momentarily left Chief Thomas's side to confront Charlotteville's "leftwing activist" mayor, who was irate at being shut out of the Command Center.

Judge Conrad's injunction. "Kessler v. City of Charlottesville," Case 3:17-cv-00056-GEC, DE. 21

In short, there is evidence, especially in light of the liberal standards afforded a pro se plaintiff, that that the City Manager was on board with Chief Thomas and the plan to wait until Antifa violence had reached such an extent that they could issue a declaration of unlawful assembly and shut down the hated UTR rally. This is, at the very least, "ratification" of lawless conduct which "would be chargeable to the municipality." *City of St Louis v. Praprotnik,* 485 U.S. 112, 1277 (1988). Given City Manager Jones's long involvement in the maneuverings by Charlottesville around the UTR rally, we clearly have ratification and possibly more.

CONCLUSION

Charlottesville and the various corrupt actors operating therein have evaded justice for long enough, even as they released an independent report detailing their misdeeds. Indeed, the importance of review where there is a question as to whether the state intentionally abdicated fundamental responsibilities regarding life and liberty in order to suppress speech cannot be overstated. This Court should grant the petition to hear Balogh out – certainly no other court has.

/s/ Glen K. Allen
Glen K. Allen
Counsel of Record
GLEN K. ALLEN LAW
5423 Springlake Way
Baltimore, MD 21212
(410) 802-6453
Glenallenlaw@protonmail.com

Frederick C. Kelly, III
LAW OFFICE OF FREDERICK C. KELLY
One Harriman Square
Goshen, NY 10924
(845) 294-7945
fckellylaw@protonmail.com

Counsel for Petitioner